



The following constitutes the
Memorandum Decision of the Court.
Signed November 21, 2016



Roger L. Efremsky
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re CFB LIQUIDATING CORPORATION,
f/k/a CHICAGO FIRE BRICK CO., an
Illinois Corporation, et al.,

Case No. 01-45483 rle
Chapter 11
Jointly Administered

Debtors.

BARRY A. CHATZ, AS TRUSTEE FOR
THE CFB/WFB LIQUIDATING TRUST,

Adversary No. 15-4136

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY,

Defendant.

MEMORANDUM DECISION ON CONTINENTAL CASUALTY COMPANY'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

1
2 **I. Introduction**

3 On March 9, 2016, Barry Chatz, as trustee for the CFB/WFB
4 Liquidating Trust (the "Trustee" and the "Trust"), filed his
5 First Amended Complaint against Continental Casualty Company
6 ("Continental"). The First Amended Complaint seeks damages for
7 breach of contract and declaratory relief regarding the
8 interpretation of the Joint Chapter 11 Plan of debtors CFB
9 Liquidating Corporation and WFB Liquidating Corporation (the
10 "Plan" and "Debtors"). Continental filed its Answer and a
11 Counterclaim in which Continental also seeks declaratory relief
12 regarding the interpretation of the Plan.¹

13 On May 31, 2016, Continental filed its motion for partial
14 summary judgment on its Counterclaim (the "Summary Judgment
15 Motion"). The Summary Judgment Motion has been fully briefed. For
16 the reasons explained here, the Summary Judgment Motion is denied
17 because Continental's interpretation of the relevant sections of
18 the Plan is incorrect.

19 **II. Background**

20 **a. Background Regarding the Chapter 11 Case**

21 Debtors manufactured and distributed refractory products
22 some of which contained asbestos. As of the October 2001 petition
23 date, Debtors were defendants in numerous personal injury and
24

25 ¹ Continental states in its Counterclaim that its claims for
26 relief are non-core and it does not consent to the entry of final
27 orders by this court. AP Docket no. 19, ¶4. On the contrary, this
28 adversary proceeding is a core proceeding pursuant to 28 U.S.C.
§157(b)(2)(A). In re Pegasus Gold Corp., 394 F.3d 1189 (9th Cir.
2005); In re Wilshire Courtyard, 729 F.3d 1279 (9th Cir. 2013);
Plan, §15.4.

1 wrongful death lawsuits in which over 22,000 individuals asserted
2 asbestos personal injury claims against Debtors and their
3 affiliates. Main Case Docket no. 422, p. 7 (June 1, 2012
4 Disclosure Statement).

5 Debtors had purchased third party liability insurance
6 policies from a number of insurers. When they filed their chapter
7 11 cases, Debtors had not yet exhausted their primary and excess
8 insurance policies with coverage periods between November 25,
9 1959 and January 1, 1987 and these insurance policies were the
10 main assets of the estate. Disclosure Statement, p. 8-9.

11 During the case, Debtors negotiated "buyback" settlements
12 with three of their primary insurance carriers (Hartford Accident
13 and Indemnity Company, Bituminous Casualty Corporation, and ACE
14 Insurance Company) (the Settlements, Settlement Agreements, and
15 the Settling Insurers). The Debtors obtained approximately \$11.5
16 million from these three Settlements. Debtors did not reach a
17 "buyback" settlement with Continental, their only other primary
18 insurance carrier.² Disclosure Statement, p. 9-10.

19 **b. Background Regarding the Plan**

20 Debtors' Plan was filed in June 2012 and confirmed in
21 September 2012. Main Case Docket no. 421 (the Plan), Docket no.
22 460 (Confirmation Order). Sections 9.1-9.3 of the Plan
23 incorporated the Settlements. Section 8.1 of the Plan described
24 the liquidating trust to which the Settlement proceeds were
25 transferred and through which allowed asbestos personal injury
26

27 ² Debtors also negotiated a similar settlement with their
28 excess insurance carrier Safety National Company.

1 claims, designated as Class 3 and Class 4 (the "Claims"), were to
2 be paid in accordance with the trust distribution procedures (the
3 "Trust Distribution Procedures") which were also incorporated
4 into the Plan.

5 Pursuant to the Settlements, Debtors sold their policies to
6 the Settling Insurers free and clear of any liens, claims,
7 interests, and encumbrances under Bankruptcy Code §363, with any
8 such liens, claims, interests, and encumbrances attaching to the
9 Settlement proceeds with the same priority and validity as they
10 held previously. In exchange, the Settling Insurers were granted
11 certain injunctive relief and releases. Plan, §7.3, §7.7, §9.
12 Each of the Settling Insurers paid in an amount that exceeded its
13 policy limits which were then "preserved for the exclusive
14 benefit" of the holders of asbestos personal injury claims. Plan
15 §9.1-9.3. Each Settlement Agreement provides, *inter alia*, that
16 the payment that the Settling Insurer made is the total it is
17 obligated to pay on account of any and all claims relating to its
18 policies, and that all "limits of liability are deemed fully and
19 properly exhausted." Disclosure Statement, Ex. B, C, D.

20 **c. Treatment of Continental in the Plan**

21 The Plan also incorporated agreed upon treatment of
22 Continental's insurance obligations. Section 8.3 is entitled
23 "Handling of Claims for which Continental May Have Financial
24 Responsibility." This section is the focus of the dispute in this
25 Summary Judgment Motion and will be discussed in detail below. In
26 short, it (1) provides that the Trust will give Continental a
27 proposal for the payment of the liquidated value of the Claims
28 the Trust contends Continental is responsible for (the

1 "Proposals"); (2) provides a structure and deadlines for
2 Continental to accept or reject any such Proposals; and (3) sets
3 out the consequences that flow from Continental's response to a
4 Proposal. Plan, §8.3.

5 Section 16.19 of the Plan is entitled "Insurance
6 Neutrality." It provides, in brief, that nothing in the Plan, the
7 Trust Distribution Procedures, or any Settlement Agreement shall
8 impair an insurer's rights, Debtors' rights, and/or the Trust's
9 rights against the Settling Insurers except to the extent
10 impaired or limited in a Settlement Agreement and/or as expressly
11 provided in §7.3 of the Plan. Plan, §16.19.³

12 **d. Background Regarding Continental's Insurance Policies**

13 Continental sold Debtors three primary-level comprehensive
14 general liability insurance policies which covered asbestos
15 personal injuries occurring from January 1, 1985 to January 1,
16 1988. Each policy provided \$1 million in coverage. Approximately
17 \$2.56 million in coverage under these three policies remained
18 available for payment of the Claims when the Plan was confirmed.
19 AP Docket no. 19, ¶15.

20 The Trust attached copies of three Continental policies to
21 the first amended complaint. AP Docket no. 15, Ex. A-C. These
22 copies of the policies were missing pages, included duplicate
23 pages, and were, in part, illegible. The court requested complete
24 legible, copies. On September 23, 2016, the parties filed a joint
25 stipulation which attached revised versions of the three policies
26 to be substituted for the original exhibits. AP Docket no. 40,

27
28 ³ The Plan is also governed by Illinois law. Plan, §16.14.

1 Ex. 1-3. The stipulation states that the parties believe that
2 "certain pages of the insuring agreements of the policies may be
3 missing." The court notes that there are, in fact, missing pages
4 but whether the missing pages are only the referenced pages of
5 the "insuring agreements" is unknown.⁴

6 With respect to bodily injury liability, the record versions
7 of the 1985 and 1986 policies state: "The company will pay on
8 behalf of the insured all sums which the insured shall become
9 legally obligated to pay as damages because of bodily injury...to
10 which this insurance applies, caused by an occurrence..." AP
11 Docket no. 40, Ex. 1, Ex. 2. The record version of the 1987
12 policy does not include this language as it consists of seven
13 almost completely illegible pages. AP Docket no. 40, Ex. 3.

14 The record version of the 1986 policy includes a page
15 defining bodily injury as "bodily injury, sickness or disease
16 sustained by any person which occurs during the policy period,
17 including death at any time resulting therefrom." AP Docket no.
18 40, Ex. 2, p. 18.⁵ The record versions of the 1985 and 1987

20 ⁴ An insurance company is presumed to know the contents of
21 its own policies. Home Ins. Co. v. Cincinatti Ins. Co., 213
Ill.2d 307, 327 (2004).

22 ⁵ In Zurich Ins. Co. v. Raymark Industries, Inc., 118 Ill.2d
23 23, 45-46 (1987) the Illinois Supreme Court held that (1) an
24 insurer must provide coverage of asbestos-related claims if the
25 claimant suffered bodily injury, sickness or disease during the
26 policy period; (2) bodily injury takes place at or shortly after
27 the time a claimant is exposed to asbestos and continues
28 throughout a claimant's exposure to asbestos; (3) an insurer
whose policy is in force at the time a claimant is exposed to
asbestos must provide coverage of that claim; and (4) each
carrier whose policy is triggered is jointly and severally liable
for the total indemnity and defense costs of a claim without

1 policies do not include pages with this language. The record
2 version of the 1986 policy includes a page with an "other
3 insurance" provision which the record versions of the 1985 and
4 1987 policies lack. Nevertheless, Continental claims this
5 provision is in all its policies. AP Docket no. 27, p. 23.

6 **e. Status of Allowed Asbestos Personal Injury Claims**

7 As a result of the Settlements, plus the payment from
8 Debtors' insolvent insurer Home Insurance Company, and the
9 settlement with its excess insurer Safety National, the Trust
10 initially had approximately \$16 million to pay Claims according
11 to the Plan and the Trust Distribution Procedures (the "Insurance
12 Fund").

13 The Trust Distribution Procedures establish a detailed
14 process for the submission and review of Claims and set forth the
15 requirements for proof of exposure to asbestos and illness.⁶ The
16 liquidated value of each Claim is determined pursuant to these
17 procedures and the holder of a Claim is entitled to receive a *pro*
18 *rata* share of that liquidated value based on the amount in the
19 Insurance Fund. The Trust Distribution Procedures establish four
20 disease levels and a set value for each one: \$40,000 for
21 mesothelioma; \$10,000 for lung cancer; \$10,000 for certain other
22

23 _____
24 proration, i.e., must pay all sums. For this case, this holding
25 means a person working for one of the Debtors who was exposed to
26 asbestos in 1985 suffered bodily injury at that time and
27 Continental's obligation to pay all sums under its policies would
28 thus be triggered. See also, John Crane, Inc. v. Admiral Ins.
Co., 991 N.E. 2d 474 (2013) (following Raymark).

⁶ The claim form requires significant detail. Main Case
Docket no. 482, Ex. B (Amended Trust Distribution Procedures).

1 cancers; and \$2,000 for asbestosis/pleural disease. Main Case
2 Docket no. 482.

3 In 2013, the Trust began to review Claims. In October 2015,
4 the Trust filed a motion for entry of an order approving and
5 allowing Claims which the court granted (the "Allowance Motion"
6 and the "Allowed Claims"). Main Case Docket nos. 533, 543. The
7 Allowance Motion stated that the Trust had received almost 28,000
8 Claims for review and had determined that approximately 14,000
9 Claims with a liquidated value of \$46 million satisfied the Trust
10 Distribution Procedures' requirements for allowance. The
11 Allowance Motion stated that the Trust was holding over \$14
12 million from which to make *pro rata* distributions on the Allowed
13 Claims. Finally, because of anticipated litigation with
14 Continental, the Trust proposed to distribute 20% of the
15 liquidated value of the Allowed Claims (roughly \$9.2 million) and
16 reserve the rest until Continental's obligations were resolved.
17 Main Case Docket no. 533.⁷

18 **f. Status of Claims Submitted to Continental**

19 Between May and September 2015, the Trust submitted
20 Proposals to Continental regarding the payment of Allowed Claims
21 that triggered Continental's policies as §8.3 of the Plan
22 provides. AP Docket no. 15, Ex. D, E, H, I. In each of these
23 Proposals, the Trust contended that Continental's allocated
24

25 ⁷ The Trust's Sur-Reply to the Summary Judgment Motion
26 states that the Trust has disbursed \$7 million through the 20%
27 *pro rata* payment and still holds approximately \$7.18 million,
28 including over \$4 million remaining from the total Settlement
proceeds. AP Docket no. 35, p. 6. The Trust's Post-Confirmation
Operating Report for Quarter Ending September 30, 2016 states it
now has a cash balance of \$6.6 million. Main Case Docket no. 551.

1 percentage of the liquidated value of each Claim was 100% of the
2 liquidated value of each Claim.⁸

3 According to Continental's Summary Judgment Motion and the
4 Trust's Opposition, the Trust has submitted Proposals to
5 Continental covering 1,133 Allowed Claims with a liquidated value
6 of \$7.9 million (the "Tendered Claims"). AP Docket no. 27, p. 11;
7 AP Docket no. 32, p. 16. In addition, the Trust's Opposition
8 states that there are 12,365 Allowed Claims with a liquidated
9 value of \$38.1 million which the Trust has not tendered to
10 Continental (the "Non-Tendered Claims") and among the Non-
11 Tendered Claims, 1,037 Allowed Claims, with a liquidated value of
12 \$14.9 million, involve occupational exposure to asbestos prior to
13 the start of the coverage period for Continental's policies,
14 i.e., before January 1, 1985. AP Docket no. 32, p. 16.

15 **III. Summary Judgment Standard**

16 Rule 56 of the Federal Rules of Civil Procedure, applicable
17 here by Federal Rule of Bankruptcy Procedure 7056, provides that
18 "[t]he court shall grant summary judgment if the movant shows
19 that there is no genuine dispute as to any material fact and the
20 movant is entitled to judgment as a matter of law." At the
21 summary judgment stage, the court's function is not to weigh
22 evidence and determine the truth of the matter, but to determine
23 whether there is a genuine issue for trial. Fed.R.Bankr.P. 7056;
24 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

25 Continental's counterclaim seeks a declaratory judgment
26 _____

27 ⁸ The Trust continued to submit Proposals for the payment of
28 Tendered Claims after it filed this Adversary Proceeding. AP
Docket no. 32, p. 16.

1 under 28 U.S.C. §2201 regarding interpretation of certain
2 provisions of the Plan.

3 The court has discretion to grant declaratory relief in
4 appropriate circumstances such as this one. U.S. v. State of
5 Wash., 759 F.2d 1353, 1357 (9th Cir. 1985) (noting declaratory
6 relief should be denied when it will neither serve a useful
7 purpose in clarifying or settling the legal relations in issue
8 nor terminate the proceedings and afford relief from the
9 uncertainty and controversy faced by the parties).

10 Neither party claims that there are disputed facts and
11 neither claims the Plan is ambiguous. Nevertheless, Continental
12 suggests that if the court finds the Plan is ambiguous,
13 Continental will provide extrinsic evidence that will support its
14 version of the drafting intent of §8.3 and the related Plan
15 provisions. This will not be necessary and §16.11 of the Plan⁹
16 precludes it as does Illinois law. See Air Safety, Inc. v.
17 Teachers Realty Corp., 185 Ill.2d 457, 462 (1999) (stating if
18 language of contract is facially unambiguous, contract is
19 interpreted as a matter of law without parol evidence).

20 **a. Continental's Summary Judgment Argument**

21 Continental's Counterclaim seeks a declaratory judgment
22 regarding the interpretation of §8.3 of the Plan. Specifically,
23 by this Summary Judgment Motion, Continental wants the court to
24 find:

25 a) The Trust is "required" as a "condition precedent to
26 _____

27 ⁹ The Plan provides that parol evidence is not admissible in
28 an action regarding the Plan or any of its provisions. Plan,
§16.11.

1 recovering against Continental with respect to any trust
2 claim," to tender to Continental...the allocated percentage
3 of that liquidated value for which the liquidating trust
4 contends Continental is responsible;

5 b) That [the phrase] "allocated percentage" in §8.3 of the
6 Plan does not permit the Trust to seek the full liquidated
7 value from Continental without allocating a percentage also
8 to the trust fund received from other primary insurers;

9 c) Continental owes no recovery to the Trust with respect to
10 any Trust Claim absent an allocated percentage proposed to
11 Continental;

12 d) The Trustee did not comply with the above referenced
13 tender requirements set forth in §8.3 of the Plan.

14 AP Docket no. 27, AP Docket no. 19, ¶18.¹⁰

15 The thrust of Continental's summary judgment argument is
16 that by proposing an "allocated percentage" of 100% of the
17 liquidated value of the Tendered Claims, the Trust is trying to
18 hold Continental liable for more than its fair share of each
19 Tendered Claim. Continental argues that the Trust has to assign
20 to Continental only that portion of each Tendered Claim for which
21 Continental would have financial responsibility under a *post hoc*
22 equitable contribution action. AP Docket no. 27, p. 15.
23 Continental contends that the precise allocation method is not
24 yet at issue but, somewhat inconsistently, also contends that the
25 Trust had to perform an equitable contribution analysis for each
26 Tendered Claim and make an allocation based on it in any Proposal
27 sent to Continental. AP Docket no. 34, p. 16. Accordingly,

28 ¹⁰ Paragraph 18 of the Counterclaim continues with
subparagraphs (e)-(g) addressing issues beyond this Summary
Judgment Motion.

1 because the Trust's Proposals with an "allocated percentage" of
2 100% are, in Continental's view, invalid, Continental's 90-day
3 time period to respond under §8.3 of the Plan has not begun to
4 run. AP Docket no. 27.

5 **b. The Trust's Summary Judgment Argument**

6 The Trust argues that the language of §8.3 of the Plan is
7 clear. It simply provides that the Trust is to make a Proposal to
8 Continental stating the allocated percentage of the liquidated
9 value of the Tendered Claims that the Trust *contends* is
10 appropriate; it does not preclude the Trust from contending that
11 Continental's allocated percentage is 100% of the liquidated
12 value of the Tendered Claims. AP Docket no. 32.

13 The Trust also argues that, while the language of §8.3 does
14 not require its Proposals to allocate as Continental insists,
15 there is in fact no basis for equitable contribution because
16 there is no unjust enrichment of the sort equitable contribution
17 is designed to ameliorate. The Trust explains that when the Plan
18 was confirmed, the number and the value of the Claims that would
19 be allowed was unknown and whether any Allowed Claims would ever
20 trigger Continental's policies was also unknown. Now, on the
21 other hand, there are Allowed Claims with a liquidated value of
22 \$46 million and the Insurance Fund initially held \$16 million
23 from which to make *pro rata* payments on these Allowed Claims. The
24 Trust points out that the \$7.9 million in Tendered Claims fully
25 exhaust the \$2.56 million available under Continental's policies
26
27
28

1 under any conceivable allocation method.¹¹ Based on this, the
2 Trust asserts there is no unjust enrichment to the Trust from an
3 allocated percentage of 100% on the Tendered Claims. Accordingly,
4 Continental was required to accept or reject the Trust's
5 Proposals as the Plan provides.¹² AP Docket no. 32, no. 35.

6 **IV. Discussion**

7 **a. Interpretation of the Plan**

8 A chapter 11 plan is a contract to which general rules of
9 contract interpretation apply. In re Bartleson, 253 B.R. 75, 79
10 (9th Cir. BAP 2000) (citing Hillis Motors, Inc. v. Hawaii Auto.
11 Dealers' Ass'n, 997 F.2d 581, 588 (9th Cir. 1993)). Under
12 Illinois law, the basic rules of contract interpretation are well
13 settled. The primary objective is to give effect to the intention
14 of the parties and a court will look first to the language of the
15 contract to determine the parties' intent; a contract must be
16 construed as a whole, viewing each provision in light of the
17 other provisions; the parties' intent is not determined by
18 viewing a clause or provision in isolation. Thompson v. Gordon,
19 241 Ill.2d 428, 441 (2011) (citing Gallagher v. Lenart, 226
20 Ill.2d 208, 232 (2007)). When parties agree to and insert

21
22 ¹¹ The Trust asserts that (1) a "time on the risk"
23 allocation method would impose at least a 10.7% liability on
24 Continental based on its three years of coverage so its share of
25 the Allowed Claims would exceed its \$2.56 million policy limits
26 by at least \$1.5 million; (2) a "pro rata by limits" allocation
method would impose a liability of 18% of the policies issued by
the solvent insurers which also exceeds Continental's policy
limits. AP Docket no. 35, p. 7.

27 ¹² The Trust also argues that Continental's interpretation
28 amounts to an effort to modify the Plan which Bankruptcy Code
§1127 and §1141 preclude. AP Docket nos. 32 and 35.

1 language in a contract, it is presumed that it was done
2 purposefully, so that the language employed is to be given
3 effect. Id. at 442 (citing Fidelity National Title Ins. Co. of
4 New York v. Westhaven Properties Partnership, 386 Ill.App.3d 201,
5 215 (2007)).

6 Where a technical term in a contract does not have a
7 commonly understood meaning, it is to be given its technical
8 meaning. Loeffel Steel Products, Inc. v. Delta Brands, Inc., 379
9 F.Supp.2d 968, 976 (N.D.Ill. 2005) (citing Restatement (Second)
10 of Contracts §202(3)(b)(1981)).

11 **b. Section 8.3 of the Plan**

12 Section 8.3 of the Plan begins by stating that it modifies
13 and supplements the Trust Distribution Procedures and controls
14 with respect to "the handling of Claims or an allocated portion
15 thereof, for which the Liquidating Trust contends that
16 Continental may have financial responsibility." It then states,
17 in relevant part:

18 The Liquidating Trust, as a condition precedent to
19 recovering against Continental with respect to any Trust
20 Claim, shall be required to *tender to Continental in*
21 *writing, a copy of the Proof of Claim ... along with any*
22 *supporting materials, along with a Notice indicating the*
liquidated value of the Claim, as determined by the
Liquidating Trust, and the allocated percentage of the
liquidated value for which the Liquidating Trust contends
Continental is responsible.

23 Plan, §8.3 (emphasis added).

24 Section 8.3 limits the number of Claims that may be
25 submitted to Continental to 660 in any quarter and 2,500 in any
26 calendar year. The section gives Continental 90 days to inform
27 the Trust whether it accepts or rejects the terms of any Proposal
28 and describes what the Trust may do if Continental rejects a

1 Proposal: the Trust may pay the Claim and then recover from
2 Continental.

3 Continental argues that the phrase "allocated percentage" in
4 §8.3 of the Plan must be given a technical, insurance-specific
5 meaning which necessarily excludes an allocated percentage of
6 100%. Based on this interpretation, Continental declined to
7 respond to any Tendered Claim on its merits. The court disagrees
8 with Continental's interpretation; it is contrary to the plain
9 and obvious meaning of the language in §8.3.

10 First, "allocate" is a word with a commonly understood
11 meaning; it is not a technical term. As used here, it simply
12 means to assign. The question before the court also concerns use
13 of the phrase "allocated percentage" in the Plan, not in an
14 insurance policy. Second, giving "allocate" an insurance-specific
15 meaning - if there is one - does not lead to the conclusion
16 Continental urges. See Caterpillar v. Century Indemnity Co., 2007
17 WL 7947740 (Ill. App.3d Feb. 2, 2007), at *4 (applying Illinois
18 law, court finds that insurance policy language dictates an "all
19 sums allocation" of defense costs, not a "*pro rata* allocation;"
20 court notes "all sums allocation" is the controlling law in
21 Illinois under Raymark). Accordingly, an "allocated percentage of
22 100%" of the liquidated value of an Allowed Claim is no different
23 than an "all sums allocation."

24 Third, use of the word "tender" in §8.3 does not show that
25 an insurance-specific meaning must be given to the word
26 "allocate." As it is used in §8.3 of the Plan, "tender" simply
27 means the Trust will present a Proposal for the payment of
28 certain Allowed Claims - based on the Trust's contention as to

1 the proper amount Continental must pay. The word "tender" in §8.3
2 does not have a technical meaning which it might have in another
3 context, i.e., a coverage dispute. See American Nat'l Fire Ins.
4 Co. v. Nat'l Union Fire Ins. Co., 343 Ill.App.3d 93, 97 (2003)
5 (discussing targeted tender doctrine under Illinois law). Here
6 "tender" simply means the Trust will give Continental a Proposal
7 stating the Trust's contention regarding Continental's financial
8 responsibility to pay the Tendered Claims.

9 Based on the foregoing, the Trust's interpretation of §8.3
10 is the appropriate one. An "allocated percentage of 100%" **is** an
11 allocation. Continental had an obligation to respond to the
12 Trust's Proposals regarding the Tendered Claims as provided by
13 §8.3 of the Plan.

14 **c. Equitable Contribution**

15 The parties agree that under Zurich Ins. Co. v. Raymark
16 Industries, Inc., 118 Ill.2d. 23 (1987), each primary insurer is
17 jointly and severally liable to pay "all sums" on covered claims
18 that trigger its policies. Continental argues that §8.3 of the
19 Plan abrogates this rule and requires the Trust to perform a
20 theoretical equitable contribution calculation for each Tendered
21 Claim and its Proposals must necessarily employ some such
22 allocation method - but excluding 100% - before Continental has
23 any responsibility to respond to any Tendered Claim.

24 In insurance law, "the right to contribution is an equitable
25 principle arising among co-insurers which permits one who has
26 paid the entire loss to receive reimbursement from another
27 insurer liable for the loss." Royal Globe v. Aetna, 82 Ill.App.3d
28 1003, 1005 (1980) (finding claim for declaratory relief for

1 contribution stated). Equitable contribution applies to policies
2 that insure the same entities, the same interests, and the same
3 risks. Id. These three elements must be met before the insurance
4 can be considered concurrent or double. Home Ins. Co. v.
5 Cincinnati Ins. Co., 213 Ill.2d 307, 316 (2004) (citing Royal
6 Globe and Couch on Insurance 3d §218.3 (rev. 2004)). In order for
7 a settling insurer to recover from another insurer under an
8 equitable contribution theory, the settling insurer must prove
9 (1) all facts necessary to the claimant's recovery against the
10 insured; (2) the reasonableness of the amount paid to the
11 insured; and (3) an identity between the policies as to parties
12 and insurable interests and risks. Schal Bovis, Inc. v. Casualty
13 Ins. Co., 315 Ill.App.3d 353, 362 (citing Royal Globe, noting
14 that excess carriers and primary carriers insure different
15 risks).

16 **c. Equitable Contribution and Allocation Methods**

17 Continental argues that the "other insurance" clause in its
18 policies supports its entitlement to contribution. AP Docket no.
19 27, p. 18, AP Docket no. 40, Ex. 2, p. 19. This provision is
20 relevant when Continental's insurance policies and some other
21 insurance policies apply to a loss; the provision requires a
22 reference to the other insurance policies to determine whether
23 "contribution by equal shares" or "contribution by limits" is
24 theoretically involved.¹³

26 ¹³ See Ins. Co. of North America v. Home and Auto Ins. Co.,
27 256 Ill.App.3d 801, 802 (1993) (describing coverage disputes
28 regarding "other insurance" issues as "a dimly lit underworld
where many have lost their way").

1 Continental asserts that the Trust is in possession of the
2 policies of the three Settling Insurers and so was required to
3 perform an equitable contribution analysis in advance of making a
4 Proposal for the payment of each Tendered Claim using some
5 unspecified allocation method based on these other policies and
6 the facts of each Tendered Claim.¹⁴

7 In an action by a settling insurer seeking equitable
8 contribution from another insurer, the burden is on the insurer
9 seeking contribution to prove the requisite factual predicates
10 for it. Cincinnati Ins. Co. v. Boller Const., Inc., 2006 WL
11 695459, *18 (N.D.Ill. 2006). Continental equates the Trust to
12 this theoretical settling insurer and posits that the Trust must
13 perform an equitable contribution calculation for Continental's
14 benefit because the Trust is holding the Insurance Fund created
15 by the sale of the Settling Insurers' policies, and in effect,
16 stands in their shoes.

17 Section 8.3 does not impose this burden on the Trust for the
18 benefit of Continental. The language of §8.3 gives the Trust
19 flexibility; it allows the Trust to state its contention
20 regarding the allocated percentage Continental must pay. When it

21
22 ¹⁴ The Trust points out that Continental has failed to ask
23 for the Settling Insurers' policies and has repeatedly failed to
24 state an allocation method it finds acceptable. AP Docket no. 35,
25 p. 9, no. 36, ¶21. In its Counterclaim, Continental alleges that
26 it will ask the court to specify the proper allocation method,
27 "e.g., by time on the risk, limits [sic], equal shares, time
28 multiplied by limits, or some other equitable method" after the
parties have presented arguments, authorities, and evidence. AP
Docket no. 19, ¶21. This suggests Continental would have
responded to any Proposal that had used an allocated percentage
of less than 100% in the same obstructionist fashion it has used
in response to the Proposals.

1 negotiated the terms of the Plan, Continental was well aware of
2 the terms of the Settlements and their effect on Continental's
3 equitable contribution rights.¹⁵ Continental could have insisted
4 on language in the Plan that achieved the goal it now seeks. It
5 failed to do so. The Plan will not be rewritten now to achieve
6 this end.

7 **d. Unjust Enrichment**

8 Continental argues that use of an allocated percentage of
9 100% creates unjust enrichment to the Trust which equitable
10 contribution is designed to correct. For several reasons,
11 Continental's effort to use an equitable doctrine offends the
12 equitable principles in play here. Continental is not being asked
13 to pay more than its fair share.

14 First, Continental's approach would require the Trust to
15 spread each Tendered Claim among each Settling Insurer's coverage
16 - an undertaking that would seem to delay the closing of this
17 case by many years and at significant administrative expense. To
18 claim that this sort of delay is warranted by an equitable
19 principle is astounding. The delay benefits only Continental and
20 burdens the Trust and its beneficiaries.

21
22 ¹⁵ In November 2009, Continental filed an objection to an
23 early version of Debtors' disclosure statement in which the
24 settlement with two of the Settling Insurers was discussed. Main
25 Case Docket no. 262. At that time, Continental complained that
26 the plan was unconfirmable and "the criteria contained in the
27 Trust Distribution Procedures would permit legions of claimants
28 to recover for claims that could not pass muster under applicable
nonbankruptcy law against the bankruptcy estate of a defendant
with little or no liability in the tort system. Worse yet, the
Plan would permit the Liquidating Trustee to completely usurp the
judicial function with further degradations of the payment
criteria." Main Case Docket no. 262, p. 8.

1 Second, there are Allowed Claims with a liquidated value of
2 \$46 million and the Trust was funded with \$16 million, \$11.5
3 million of which came from the Settling Insurers. There are 1,133
4 Tendered Claims with a liquidated value of \$7.9 million and
5 Continental has \$2.56 million in available coverage. There are
6 12,365 Non-Tendered Claims with a liquidated value of \$38.1
7 million. Of these 12,365 Non-Tendered Claims, there are 1,037
8 claims with a liquidated value of \$14.9 million that do not
9 trigger Continental's policies. Standing alone, this \$14.9
10 million group of Non-Tendered Claims exhausts the remaining
11 coverage under the Settling Insurers' policies. Based on this
12 calculation, the Trust determined that under any allocation
13 theory, Continental will be required to pay its \$2.56 million in
14 policy limits on the Tendered Claims. Accordingly, the Trust made
15 the prudent decision to refrain from performing what it
16 determined was a pointless and expensive exercise. Section 8.3
17 does not mandate this and the court will not compel the Trust to
18 undertake it now. There is clearly no threat of unjust enrichment
19 to the Trust, the Settling Insurers, or the holders of the
20 Allowed Claims. Any unjust enrichment would be only Continental's
21 if its approach were employed.

22 **e. Exhaustion**

23 Continental concedes that an allocated percentage of 100% is
24 appropriate if the Settling Insurers' policies are exhausted.¹⁶
25 However, Continental argues that the Settling Insurers' policies
26

27 ¹⁶ Continental also acknowledges that an allocated
28 percentage of 100% is appropriate where a Claim triggers only its
policies. AP Docket no. 34, p. 18.

1 are not exhausted because the Trust is still holding their policy
2 proceeds in the Insurance Fund. According to Continental, because
3 the holders of Allowed Claims have vested rights in the Insurance
4 Fund, the Trust must perform some sort of allocation analysis to
5 respect Continental's equitable contribution rights.

6 The Trust argues that the court need not find that the
7 Settling Insurers' policies are exhausted to rule in the Trust's
8 favor on the interpretation of §8.3, but certainly can make this
9 finding on this record. Here, the Settling Insurers each paid
10 more than their policy limits and obtained releases from the
11 estate; these Settlements are equivalent to fully paying their
12 policy limits for the exclusive benefit of the holders of Allowed
13 Claims. The Trust argues that the Settling Insurers have thus
14 completely fulfilled their obligations as insurers and their
15 policies are, in effect, exhausted.

16 However, under Illinois law, the holders of Allowed Claims
17 may have an interest in the policy proceeds which were
18 transferred to the Trust. See In re Allied Products Corp., 2004
19 WL 635212, at *6-7 (N.D. Ill. Mar.31, 2004) (finding that for
20 purposes of adequate protection, claimants had an interest in the
21 policies the debtor proposed to sell back to its insurers in a
22 manner that diluted the claimants right to adequate protection).
23 Section 9 of the Plan is in accord with this.

24 While the existence of the Insurance Fund held by the Trust
25 may suggest that the Settling Insurers' policies are not
26 technically exhausted, this fact alone is insufficient to require
27 the Trust to perform what is ultimately a pointless equitable
28 contribution analysis and propose an allocation that Continental

1 may or may not find acceptable. The Plan does not require it, and
2 in fact, specifically permits the Trust to submit Proposals to
3 Continental based on the Trust's contention regarding
4 Continental's obligations.

5 Continental also argues that the Trust's position makes
6 Continental's obligations equivalent to those of the Settling
7 Insurers under their "buyback" Settlements. This is incorrect.
8 The Settling Insurers each paid more than their policy limits in
9 2012. Continental has no such obligation and the Trust is not
10 seeking to impose one. The Settling Insurers each performed their
11 obligations under the Settlements as of the effective date of the
12 Plan in 2012. Now, some four years later, Continental is instead
13 asking for a strained interpretation of the Plan that appears
14 designed to prolong the life of the Trust for Continental's
15 benefit, and at the expense of the Trust and the holders of
16 Allowed Claims. It is worth remembering that the Claimants were
17 injured in the 1980's, that this case has been pending since
18 2001, and imposing further unnecessary delay in compensating the
19 Claimants or their estates is, on these facts, unfair.

20 **V. Conclusion**

21 Section 8.3 of the Plan says the Trust is to make a Proposal
22 to Continental of the allocated percentage of the liquidated
23 value of the Claims for which the Trust contends Continental is
24 responsible. An allocated percentage of 100% is an allocation.
25 The Trust made Proposals to Continental that conformed to the
26 terms of the Plan and Continental had a duty under the Plan to
27 respond to the Proposals made by the Trust. In addition, the
28 undisputed facts show there is no basis to require an equitable

1 contribution analysis because there is no unjust enrichment to
2 the Trust by proceeding in this fashion.

3 A separate order will be entered conforming to this
4 memorandum decision.

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6 * * * * * **End of Memorandum Decision** * * * * *

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2 Court Service List:

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4 No service required.
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